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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In re)
)
MIDWEST WIRELESS IOWA, L.L.C.)
)
Petition for Waiver of FCC Rule)
Sections 54.313 and 54.314)

CC Docket 96-45

MAR 20 2003

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: Chief, Telecommunications Access Policy Division
Wireline Competition Bureau

PETITION FOR WAIVER

Midwest Wireless Iowa, L.L.C. ("Midwest"), by counsel and pursuant to Section 1.925 of the Commission's Rules, 47 C.F.R. § 1.925, hereby requests a waiver of Sections 54.313 and 54.314 of the Commission's Rules, 47 C.F.R. §§ 54.313, 54.314.' Midwest requests that the Commission accept Midwest's annual certification for high-cost universal service support to allow Midwest to receive universal service funding as of July 12, 2002, the date upon which the Iowa Utilities Board granted Midwest's application for eligible telecommunications carrier ("ETC") status.

I. Background

Midwest is authorized as the "B-band" cellular carrier for the following Rural Service Areas ("RSAs"): IA-6 (Iowa), IA-13 (Mitchell), IA-14 (Kossuth), IA-15 (Dickinson), and the northern portion of IA-16 (Lyon). On June 12, 2002, Midwest filed an application with the Iowa Utilities Board ("Board") seeking designation as an ETC to enable it to receive federal universal service support for service to customers in both rural and non-rural areas in its Iowa service territory. Midwest included with its application a letter certifying that it would use federal high-cost support

1 A fee is not required to be submitted with this request.

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only for the provision, maintenance and upgrading of the facilities and services for which that support is intended. On July 12, 2002, the Board issued an Order designating Midwest as an ETC throughout the service areas of the affected non-rural LECs and of the rural LECs whose study areas were covered in their entirety.’

Under FCC Rule Sections 54.313 and 54.314, if a state wishes local exchange carriers and competitive ETCs within its borders to receive federal universal service support, it must file an annual certification with USAC and the Commission stating that all federal high-cost support will be used only for the provision, maintenance, and upgrading of facilities and services for which the support is intended. 47 C.F.R. §§ 54.313-314. Pursuant to these rule provisions, the Board filed its high-cost certification with USAC and the Commission on September 27, 2002.

Because Midwest became eligible for high-cost funding on July 12, 2002, and it certified to its compliance with Section 254(e) of the Act on the date of its application, the company became eligible to receive support from July 12 onward. However, under the FCC’s rules, the state’s certification letter will entitle Midwest to begin receiving support only in the first quarter of 2003.³ In order to receive support for July 12, 2002 to December 31, 2002, under Sections 54.313 and 54.314, the Board would have had to make reference to Midwest in its certifications filed April 1, 2002, and July 1, 2002.⁴ Obviously, this was not possible because Midwest was not designated until

2 See Midwest Wireless Iowa, L.L.C., Docket No. 199 IAC 39.2(4), Order Designating Eligible Carrier (issued July 12, 2002) (“Midwest ETC Order”), attached hereto as Appendix A. With regard to those rural LECs whose study areas are only partially covered by Midwest’s service area, Midwest asked the Board to reclassify each wire center as a separate service area to allow Midwest to be designated in all areas it serves, and to submit such redefinition for FCC concurrence pursuant to 47 C.F.R. § 54.207(c). That request remains pending.

3 See 47 C.F.R. §§ 54.313(d)(3)(i) and 54.314(d)(1).

4 See 47 C.F.R. §§ 54.313(d)(3)(iii) and 54.314(d)(3).

July 12,2002.

Although the Commission's certification rules allow a state to file a supplemental certification for carriers that were not eligible for support at the time the state filed its initial certification,' there is no mechanism for newly designated ETCs to receive support for the period preceding the initial certification or the three-month period following such certification. Accordingly, at Midwest's request, the Board filed a supplemental certification with USAC and the Commission on November 14,2002 (See Attached Copy).

For the reasons stated below, Midwest respectfully requests a waiver of the April 1, 2002, and July 1,2002, certification deadlines to allow universal service support to commence accruing on July 12,2002, the date that it became eligible for support.

II. Argument

Sections 54.313 and 54.314 are not explicit as to when a new competitive ETC is to begin accruing universal service support. Before July 1, 2002, Midwest had not yet been designated as a competitive ETC. Its ETC application was pending before the Board, and the Board did not pass on Midwest's qualifications for ETC status until July 12, 2002. If the rule is read to mean that a certification must be filed before Midwest is granted ETC status, then compliance is impossible, since ETC designation is a prerequisite to certification.⁵ Midwest believes it has never been the

⁵ See *Federal-State Joint Board on Universal Service, Multi-Association Group (MAG) Plan for Regulation of interstate Services & Non-Price Cap incumbent Local Exchange Carriers and Interexchange Carriers, Fourteenth Report and Order, twenty-second Order on Reconsideration, and Further Notice & Proposed Rulemaking*, 16FCC Rcd 11244, 11319 (2001) ("*Fourteenth Report and Order*").

⁶ See 47 CFR § 54.314(b) "A rural incumbent local exchange carrier not subject to the jurisdiction of a state or an eligible telecommunications carrier not subject to the jurisdiction of a state serving lines in the service area of a rural incumbent local exchange carrier that desires to receive support pursuant to §§ 54.301, 54.305, and/or 54.307 and/or ~~Part~~ 36, Subpart F of this chapter shall file an annual certification with the Administrator and the Commission stating that **all** federal high-cost support provided to such carriers will be used only for the provision, maintenance, and upgrading of facilities and services for which the support **is** intended." (emphasis added). In order to make a certification, the carrier

FCC's intent to make compliance an impossibility.

The Commission's recent actions suggest that high-cost support is intended to accrue upon the date that the state Public Service Commission designates the service provider as an ETC.⁷ In its recent grant of just such a waiver request filed by RFB Cellular, Inc. the Commission found that grant of a waiver of Section 54.314 is justified where and ETC would be denied an entire quarter of universal service support simply because the ETC designation occurred after the certification deadline and that such special circumstances outweigh any processing difficulties that USAC may face as a result of the late-filed certification.⁸ The relief Midwest **seeks** is virtually identical to the Commission's recent grant of a waiver of Section 54.314 to RFB Cellular, Inc. Midwest seeks to have universal service support paid retroactively to the date of its ETC designation, however, in Midwest's case the denial of support would be even more egregious since without grant of the instant waiver request nearly an entire six months of support would be denied.

Denial of funding to Midwest until July 1, 2002 would be inequitable and unduly burdensome.' Pursuant to the Midwest ETC Decision, Midwest must make its universal service offering available to consumers immediately and it has done so. It would be unfair to require Midwest to assume the responsibilities required of an ETC to make services available to all customers requesting service without being provided the support needed to meet these

must first be a designated eligible telecommunications carrier

⁷ See *Federal-State Joint Board on Universal Service, RFB Cellular, Inc., Petitions for Waiver of Sections 54.314(d) and 54.307(c) of the Commission's Rules and Regulations, DA 02-3316* (WCB rel. Dec. 4, 2002) ("*RFB Order*")¶ 8.

⁸ See *id.*, wherein the FCC instructs USAC to phase-in a pair of retroactive payments with RFB Cellular's regular monthly support until all retroactive support has been paid.

⁹ See 47 C.F.R. §1.925(b)(3)(ii).

responsibilities. Surely the Commission has never contemplated such a result.

In fact, the FCC has taken just the opposite view when the state of West Virginia inadvertently filed its certification after the appropriate deadline.” There, the Commission found good cause to continue funding in order to remedy, “the potential harm that would be suffered by customers of non-rural carriers in West Virginia, as a consequence of the West Virginia Commission’s failure to timely file its section 54.313 certification before the October 1, 2000 deadline.”” In addition, the Commission reasoned, “We note that the potential harm caused by loss of one quarter of annual federal high-cost support is particularly egregious in a state such as West Virginia, which historically has service costs in excess of the national average.”¹²

The same considerations are applicable here. Midwest is an ETC serving the public in a very rural area, it has a valid certification on file as of June 12, 2002, and it should be permitted to commence service as an ETC immediately with appropriate funding.

The underlying purpose of the rule will not be served by delaying funding until July 2002.¹³ The certification rule is intended to ensure that the Commission has received adequate assurances that universal service funds will be used for the purposes for which they are intended. Midwest has submitted a certification which sufficiently demonstrates that the support will be used only for the “provision, maintenance and upgrading of facilities and services for which the support is intended.”

10 *West Virginia Public Service Commission Request for Waiver of State Certification Requirements for High-Cost Universal Service Support for Non-Rural Carriers, Order*, 16 FCC Rcd 5784 (March 13, 2001), “*West Virginia Order*”. Note that the waiver granted to the West Virginia Public Service Commission (PSC) was necessary because the PSC filed its annual certification after the October 1 deadline, not because a certification was filed after ETC designation was made as in the instant case.

11 *Id.*, 16 FCC Rcd at 5786

12 *Id.*

13 *See* 47 C.F.R. § 1.925(b)(3)(i)

The question of whether Midwest should receive funds is resolved. Midwest should not be penalized by an apparent quirk in the rules, which creates a certification deadline that is prior to an applicant's designation as an ETC and therefore makes compliance impossible. The rule's purpose was never to leave a new ETC without funding for any extended period during which it has ETC obligations. Such a result would undermine the Commission's well-established competitively neutral universal service policies. The Commission made this precise determination in its recent grant of RFB Cellular, Inc.'s waiver request¹⁴

Grant of this request would serve the public interest.¹⁵ The universal service program is intended to promote access to advanced services in areas where telephone subscribership has been historically low. Midwest's universal service program furthers this goal by providing a competitive choice of universal service providers in high cost areas of Iowa. High cost support funding will enable Midwest to promptly upgrade and construct new facilities to provide quality service to Iowa's residents.

III. CONCLUSION

Midwest requests that the Commission treat Midwest's certification as a timely-filed annual certification and allow Midwest to begin receiving universal service funding as of June 12, 2002.

¹⁴ See *RFB Order* at ¶ 9.

¹⁵ See 47 C.F.R. § 1.925(b)(3)(i).

Wherefore, for good cause shown, Midwest respectfully submits that a waiver of the rules as set forth above will serve the public interest.

Respectfully submitted,

Midwest Wireless Iowa, L.L.C.

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March 20, 2003



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STATE OF IOWA

THOMAS J VILSACK
GOVERNOR
SALLY J PEDERSON
LT GOVERNOR

IOWA UTILITIES BOARD
IOWA DEPARTMENT OF COMMERCE

November 7, 2002

Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 - 12th Street, SW
Washington, DC 20554

Irene Flannery
Universal Service Administrative Company
2120 L Street, NW - Suite 600
Washington, DC 20037

Re: Midwest Wireless Iowa LLC
Supplemental Certification Of Support Pursuant To 47 C.F.R. § 54.314
CC Docket No. 96-45

Dear Ms. Dortch / Ms. Flannery:

Pursuant to 47 C.F.R. § 54.314, I hereby certify on behalf of the Iowa Utilities Board (Board) that Midwest Wireless Iowa LLC ("Midwest") certified to us on May 28, 2002, that it will use all high cost **support** it receives only for the provision, maintenance, and upgrading of facilities and services for which support is intended, pursuant to Section 254(e) of the Communications Act of 1934, as amended.

Midwest has informed the Board that it intends to seek a Commission waiver of the requirement under 47 C.F.R. §§ 54.313(d)(3)(i) and 54.314(d)(1) that state certifications be filed prior to October 1 for the receipt of support during the next calendar year. Therefore, in order that Midwest may obtain such a waiver **and** begin receiving high-cost support immediately, the Board requests that the instant certification be deemed effective as of **July 12, 2002**, the date on which the Board designated Midwest as an ETC.

Please contact the undersigned if there are any questions concerning this matter.

Sincerely,

Judi K. Cooper
Executive Secretary
/jrl

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CERTIFICATE OF SERVICE

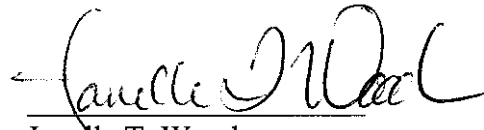
I, Janelle T. Wood, a secretary of the law firm Lukas, Nace, Gutierrez & Sachs, hereby certify that I have, on this 20th day of March, 2003, placed in the United States mail, first-class postage pre-paid, a copy of the foregoing *PETITION FOR WAIVER* filed today to the following:

Jim Langenburg, **Esq.**
Iowa Utilities Board
350 Maple Street
Des Moines. Iowa 50319-0069

Jennifer Johnson, **Esq.**
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Janelle T. Wood